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No. 95-1217

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBERT DUSHAW,

Petitioner,

vs.

ROADWAY EXPRESS, INC. and TRUCK DRIVERS UNION LOCAL 407,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT TRUCK DRIVERS UNION LOCAL 407

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly reversed the District Court's judgment, on the basis that any breach of the Union's duty of fair representation did not affect the ultimate outcome of the Petitioner's grievance.

2. Whether the Court of Appeals properly applied the "clearly erroneous" standard in reviewing the District Court's factual findings.

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STATEMENT OF THE CASE

A. Statement of Facts

Dushaw was a city delivery truck driver employed by Roadway Express, Inc. ("Roadway" or "the Company") and was a member of Truck Drivers Union Local 407 ("Local 407" or "the Union"); he was the Union steward for approximately 5 years, until the date of his termination. (TR I 10).[1] The terms and conditions of Dushaw's employment were governed by a multi-employer collective bargaining agreement known as the National Master Freight Agreement, the Central States Area Local Cartage Supplemental Agreement, and the Ohio Addendum thereto (collectively, "the Contract").

The Contract provides a multi-step process for the implementation of employee discipline, including discharges, and for the resolution of grievances. Under the Contract and the Ohio Addendum, no employee may be discharged or taken out of service without first being given a hearing by his employer. If the parties are unable to resolve the matter at the company level, a formal grievance is filed and heard by the Cleveland Joint Committee, a joint labor-management committee composed of representatives of Local 407 and of freight industry employers in the Cleveland area (referred to as the "Cleveland hearing" or the "local-level hearing"). If there is no resolution at the Cleveland hearing, the next step of the grievance process is a hearing in Columbus, Ohio before the Ohio Joint State Grievance Committee ("the Joint State Committee"), a joint committee composed of equal numbers of representatives of

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1. The trial proceedings were transcribed by two different court reporters. The first five days of the trial are contained in three separate volumes, numbered pages 1-686, designated as TR I. The remaining two days of the trial were transcribed in two volumes paginated 1-357 and designated as TR II.

other local unions and other freight companies. Joint State Committee members may not hear cases involving their own local union or their own company.

Roadway called a company-level hearing for April 21, 1987, indicating that it intended to discharge Dushaw based on his overall work record. (TR I 296-97). Richard Sanzo, the Union business representative, attended the company-level hearing as the primary representative arguing on behalf of Dushaw; alternate Union steward Ken Scullion was in attendance primarily as a witness to the proceedings. (TR II 308-09, 311-12). Sanzo previously had successfully presented two grievances filed by Dushaw, one involving a one-day suspension and the second — just 10 months earlier — involving a discharge, which Sanzo was able to have reversed. (TR I 269-72).

At the hearing, the Company discussed a number of warning letters issued to Dushaw and two major incidents, one involving a delivery to Gray Drug on March 4 and the other a series of deliveries to the Beechwood area on the previous day, April 20. (TR I 296-97). The first incident occurred when Dushaw allegedly took too long to unload a delivery at a Gray Drug warehouse. The customer had written Roadway to complain about Dushaw's idleness and his chatting with other delivery drivers while Gray Drug employees unloaded his freight; the letter requested that he not be sent on deliveries to its warehouse in the future.

The second major incident involved Roadway's claim that Dushaw wasted time in the Beechwood deliveries by passing over delivery stops, out of their logical order. Dushaw argued the freight was loaded in his truck in such a way that he could not reach the items for the planned earlier stops until he unloaded the freight for what should have been later stops.

Although neither Sanzo nor Dushaw knew in advance exactly what issues the Company would raise to support its planned discharge of Dushaw, Sanzo responded to the Company's arguments and allegations and even persuaded Roadway to withdraw some of the previously issued warning notices. (TR I 297-300). At the trial, Dushaw's only complaint about the manner in which Sanzo handled his grievance at the company-level hearing was his failure to insist on the presence of a Company supervisor as a possible witness, even though Dushaw did not know what the supervisor would say, the Union had no power to force the Company to produce him, and Sanzo was concerned that a Company man would not help Dushaw's case. (TR I 304-06, 664). At the conclusion of the company-level hearing, Roadway notified Dushaw his employment was being terminated based on his overall work record and on the events during the Gray Drug and Beechwood deliveries. (TR I 132, 301).

Dushaw and Sanzo discussed the evidence that should be used to support Dushaw's grievance over his discharge and Dushaw, an experienced Union steward, gathered evidence for Sanzo to present on his behalf. (TR I 136-39; TR II 306). At the Cleveland hearing, as Dushaw acknowledged, Sanzo made every argument Dushaw wanted presented and challenged each and every contention made by Roadway at that hearing. (TR I 315-16). Dushaw also was able to make a statement and to say anything and everything he wanted to in his own defense. (TR I 316-17). The Cleveland Joint Committee was deadlocked on the grievance, and it was referred to the next level, the Joint State Committee. (TR I 145-46, 318-19; TR II 307).

Before the Joint State Committee hearing, Dushaw gave Sanzo for his review a handwritten statement, which Sanzo told him to have typed up by a secretary at the Union office; the two-page, typed statement was later read at the hearing. (TR II 307-

08; TR I 329). Before the hearing on May 21, 1987, Sanzo met with Dushaw for approximately 45 minutes to review the facts of his case and their presentation. (TR I 333-34). During the hearing, Sanzo read Dushaw's statement, addressed the Company's evidence and made every argument Dushaw wanted him to make in the presentation of his case.[2] (TR I 335-49). Dushaw spoke to the panel members throughout the proceedings and, as he admitted, was able to present any statements or evidence he wanted to present. (TR I 335-49). The unanimous decision of the Joint State Committee, which was final and binding under the Contract, was to deny Dushaw's grievance and uphold the discharge. (TR I 149-50, 349).

Following the decision from the Joint State Committee, Dushaw obtained a written statement from Gray Drug, confirming a prior verbal statement from Gray Drug that Dushaw had conveyed to the Joint State Committee at the hearing. The written statement supported his position on some, but not all, of the facts relating to that incident, although Gray Drug never retracted its request that Dushaw no longer make its deliveries. Sanzo filed a new grievance on Dushaw's behalf, asking that his discharge be reconsidered on the basis of new evidence. This grievance was processed through the contractual processes; eventually, the Joint State Committee issued a decision refusing to reopen the case, on the grounds that the written statement did not constitute new evidence. (TR I 153-57, 161, 350-54).

At the trial, Dushaw attempted to second-guess every action and argument by Sanzo through the three steps of the grievance

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2. The Cleveland hearing was the only step of the grievance proceedings for which a transcript was prepared. However, the parties agreed that all the arguments presented at the Cleveland hearing were presented to the Joint State Committee.

process; before this Court, however, his protest centers on alternate steward Ken Scullion's purportedly false "testimony" at the company-level hearing. Dushaw never objected to Scullion's presence at the hearing.[3] (TR II 304-06). Moreover, Scullion did not testify against Dushaw, as he asserts, but simply responded to questions from his employer regarding his work as a loader on Dushaw's truck on March 4 and April 20. (TR II 304, 307; TR II 217-19). Sanzo did not know that Scullion, who was present only as an observer, had any knowledge of those matters or that the Company would ask him any questions as a fact witness. (TR II 304).

Dushaw asserts that Scullion made a statement at the April 21 hearing that most or all of the freight for the Gray Drug delivery was on skids or pallets, making it easier to unload quickly and supporting the Company's position that Dushaw spent more time than he should have. Petition for Writ of Certiorari at 5 [hereinafter "Petition"]. This statement is not supported by the record. The employer's representative said at the Cleveland hearing that Scullion had "indicated they could have been but they may not have been [skidded]. So we called and got the bill [of lading]. They were skidded and the manifest indicates they were skidded. . . ." (Plaintiff's Trial Ex. 9).[4] The

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3. Dushaw states that there was "bad blood" between him and Scullion (Petition for Writ of Certiorari at 4), an assertion not supported by the record. At most, Scullion had run against Dushaw for the position of Union shop steward; Scullion was later appointed alternate steward, a position that was required in part because Dushaw as a city driver was often away from the terminal when a steward was needed. There was no evidence of any other conflict between the two, and the suggestion that Scullion would lie to the Company to achieve Dushaw's discharge because he wanted Dushaw's position — the unpaid and largely thankless job of shop steward — is simply not credible.

4. Scullion did not appear in any capacity at the Cleveland or Columbus

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Company relied not on information supposedly received from Scullion but on its own documents to support its position that a great portion of the Gray Drug load was on skids. Dushaw contradicted Roadway's position, testifying before the Cleveland Committee that his freight was not skidded as alleged by the Company and that he had loose cartons in his trailer; this argument was also presented at the Joint State Committee hearing. (TR I 630-31; TR II 325).

Regarding the Beechwood incident, Dushaw states Scullion had said that he (Scullion) had loaded "a majority" of the freight on Dushaw's trailer on April 20 and that it was loaded properly. Dushaw then argues that the Company relied upon these statements by Scullion when it presented its evidence at the Cleveland and Columbus hearings. Petition at 7. However, at the Cleveland hearing the panel members had available to them the Company's manifest showing that 14 different individuals had loaded Dushaw's trailer that day, and it was clear to the Committee members that no one person had loaded the majority of Dushaw's freight. The Company conceded that, though Scullion may have checked Dushaw's load, he did not personally load the freight. (Plaintiff's Trial Ex. 9 at 76-80). The Company and the arbitration panel members did not rely on any statements that Scullion made concerning the Beechwood incident but, rather, on the manifest, a Company document. In addition, Company officials stated at the Cleveland and Columbus hearings that they had checked the truck and found it to be properly loaded, so any statement by Scullion[5] was simply not

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hearings; to the extent his statements were considered at these hearings, they were related to the Committees by the Company's representatives. Scullion did not testify at trial because of a serious medical problem. (TR. II 203).

5. The conclusion that Scullion spoke falsely is not supported by the evidence, which did not show that Scullion ever stated he had personally
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dispositive. (TR II 12, 21719, 275-76). Moreover, Sanzo was not concerned with how the trailer was loaded because freight moves around in a trailer once it is away from the dock and the driver must deliver it in the best manner possible. (TR II 305). The way the freight was delivered was the more critical issue, Sanzo argued, and Dushaw made the Beechwood deliveries in the best way he could.

Dushaw refused to accept the unanimous decision of the Joint State Committee that Roadway had good cause to discharge him. He filed this action against the Company and the Union, alleging that Roadway breached the provision of the Contract permitting it to discharge him only for just cause and that Local 407 breached its duty to represent him fairly in the grievance process.

B. Proceedings in the District Court

A bench trial was held from January 22 through January 26 and January 29 through January 30, 1990. Two years later, on January 3, 1992, the District Court issued an opinion finding that Roadway breached the collective bargaining agreement when it terminated Dushaw's employment and that Local 407 breached its duty of fair representation in the manner in which it pursued Dushaw's grievance. (A.17). The District Court issued its decision without benefit of a transcript of the trial, which was prepared only for the appeal.

After briefing by the parties on a variety of issues relating to

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loaded the truck. Dushaw testified he could not remember exactly what Scullion said at the company-level hearing but agreed that Scullion said he had *checked* the trailer and "there was no reason I [Dushaw] couldn't deliver from point A to point B." (TR I 307). The Company's Operations Manager also stated that the freight was properly loaded. (TR I 454, 460-63).

damages, on September 18, 1992, the trial court awarded Dushaw compensatory damages in the amount of $107,774.19 and attorney's fees and costs in the amount of $165,450.22, both apportioned between the Defendants according to a formula set forth in the trial court's order of April 9, 1992, and punitive damages against Roadway in the amount of $100,000. (R.213: Memorandum and Order). By order dated October 28, 1992, the trial court denied Dushaw's motion for reconsideration or clarification of the damages ruling, concluding the case and making all previous orders final and appealable. (R.223: Memorandum, Opinion and Order).

C. Proceedings in the Court of Appeals

Both the Union and Roadway appealed the trial court's rulings on liability and damages; Dushaw appealed certain of the trial court's rulings on damages and other aspects of the remedy. The parties briefed and argued the case in the Court of Appeals for the Sixth Circuit, after lengthy delays in the preparation of the transcript of the District Court proceedings caused by the intervening death of one of the two original court reporters. On September 27, 1995, the Sixth Circuit issued its decision reversing the judgment of the District Court. (A.1).

The Court of Appeals assumed, *arguendo*, that the Union acted in a bad faith, arbitrary or discriminatory manner but held that there was no evidence to support the District Court's finding that such actions tainted the grievance procedure. (A.11). Because the evidence showed that "the ultimate decision to affirm Dushaw's discharge was made by a committee who heard both sides of the story" and had seen all the relevant evidence, and because Dushaw admitted that "he had had an opportunity to present all issues he wished to present," the court found that there was no indication the Union failed to present any evidence that " 'probably would have brought about a different decision' in the grievance proceeding." (A.12). Accordingly, the Court of

Appeals ruled that the District Court's finding that the presumed violation of the Union's duty of fair representation tainted the grievance proceeding was clearly erroneous. *Id.*

The Petitioner filed a request for rehearing and rehearing en banc in the Court of Appeals. The petition for rehearing en banc was denied, and the request for rehearing was referred to the original panel. (A.14-15). The panel denied the request for rehearing but revised its opinion to append a separate concurring opinion by Circuit Judge Wellford. The short concurring opinion —*not* the panel's decision, as the Petitioner now states (Petition at 11) — noted that:

> this case presents a very close question on the question of taint as a consequence of Scullion's mistaken or false testimony. The taint, if any, however, in my view, as expressed by our opinion in light of the entire record, did not affect the ultimate outcome.

(A.15). The concurring opinion went on to note that, even if Dushaw had prevailed on the merits of his claim, he would have been entitled to receive, at most, only appropriate compensatory damages after mitigation and reasonable attorney fees and that the District Court's award, which included "improper punitive damages and exorbitant fees and interest," would have been set aside. *Id.*

REASONS FOR DENYING THE WRIT

The Petitioner has asked this Court to review this case on the grounds that the Sixth Circuit — along with every other Court of Appeals that has considered the question — has misapplied the law regarding the elements of an employee's "hybrid 301" suit under the National Labor Relations Act, that the Sixth Circuit's decision on the quantum and nature of proof in such cases is in conflict with a decision of the Eighth Circuit and that the Sixth Circuit improperly applied the "clearly erroneous" standard in reviewing the factual findings of the trial court. None of these arguments has merit, and they are merely intended to obscure and muddle what in reality is a simple case.

Examining the specific facts of this case, the Court of Appeals found that any breach of the duty of fair representation by the Union (if it occurred) simply did not affect the ultimate outcome of Dushaw's grievance hearing. Accordingly, the Sixth Circuit held there was no justification for overturning the final and binding arbitration decision, and the District Court's ruling in favor of the Petitioner was reversed. There is no basis for this Court to overturn the Sixth Circuit's ruling on this limited but dispositive issue, and the petition for a writ of certiorari should be denied.

A. The Finality of Labor Arbitrations

Our national labor policy clearly favors resolution of labor contract disputes by private, collectively bargained mechanisms. "Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." 29 U.S.C. § 173(d); *see also id.* §§ 157, 158(d), (e); *see generally Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363

U.S. 593 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). Federal courts do not have plenary power to review the merits of an arbitration decision.[6] *Hines*, 424 U.S. at 563. Rather, the courts must defer to the agreed-upon tribunal's interpretation of the contract "as long as the award draws its essence from the bargaining agreement." *Id.*

Section 301 of the National Labor Relations Act, 29 U.S.C. § 185, vests in the federal district courts jurisdiction over "[s]uits for violation of contracts between an employer and a labor organization." While such a cause of action is not expressly set forth in the statute, the courts have permitted actions known as "hybrid 301" suits, in which an individual union member may bring an action for breach of a collective bargaining agreement between the employee's union and the employer.

A plaintiff employee in a hybrid 301 suit must prove *both* that the employer's action violated the terms of the collective bargaining agreement *and* that the union breached its duty of fair representation with regard to the matter. *Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *see also Hines*, 424 U.S. at 570-71. Proof of unfair representation by the union is a prerequisite to finding liability against either the union *or* the employer. *Vaca*, 386 U.S. at 186. In the absence of unfair representation by the union, an employee does not have standing to sue to overturn the arbitration decision. *Bacashihua v. United States Postal Serv.*, 859 F.2d 402, 405-06 (6th Cir. 1988).

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6. The courts have "recognized that the decisions of joint management-labor panels are entitled to the same degree of deference accorded to the decisions of single arbitrators." *White v. Anchor Motor Freight, Inc.*, 899 F.2d 555, 560 n. 6 (6th Cir. 1990); *see generally Hines* (involving decision by joint committee under a Teamsters' national master contract).

The courts apply a "highly deferential" standard when reviewing the conduct of a union to determine whether there has been a breach of the duty of fair representation. *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991). Specifically, a union does not breach its duty of fair representation to a member unless its actions are "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. at 190. This Court has held expressly that "mere negligence, even in the enforcement of a collective bargaining agreement, would not state a claim for breach of the duty of fair representation." *United Steelworkers of America v. Rawson*, 495 U.S. 362, 372-73 (1990). Furthermore, "grievance processes cannot be expected to be error-free." *Hines*, 424 U.S. at 571.

B. The Requirement of Proving Taint in the Arbitration Process

In *Vaca v. Sipes*, which established the standards for determining when a union has breached its duty of fair representation, this Court considered a union's decision not to take an employee's grievance to arbitration. *Hines* addressed the liability of a union for its actions in presenting a grievance in arbitration. The *Hines* Court held that, to overturn an arbitration decision, employees "must show not only that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." 424 U.S. at 570-71. This rule was intended to balance the policy favoring the finality of labor arbitrations with protection for discharged employees who otherwise "would be left without jobs and without a fair opportunity to secure an adequate remedy." *Id.* at 571.

Specifically, *Hines* held that a plaintiff employee must prove "an erroneous discharge and the Union's breach of duty *tainting the decision* of the joint committee." *Hines*, 424 U.S. at 572 (emphasis added). In other words, a union's breach of its

duty of fair representation removes the bar contained in the finality provisions of a contract's arbitration clause only "if it seriously undermines the integrity of the arbitral process." *Id.* at 567. The question of whether a union breached its duty is "a wholly unnecessary determination if the union's conduct was irrelevant to the finality of the arbitral process." *Id.* at 568.

Applying this Court's ruling in *Hines*, "courts have held unions not liable for breaches of their duty of fair representation absent evidence that *but for the union's conduct the employee would not have been injured.*" *Wood v. Teamsters Local 406*, 807 F.2d 493, 502 (6th Cir. 1986), *cert. denied*, 483 U.S. 1044 (1987) (emphasis added) (citation omitted).

> The impact of the breach on the outcome must, moreover, have been substantial; to establish a breach of fair representation, the plaintiff must meet the onerous burden of proving that the grievance process was "*seriously flawed* by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct."

Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir. 1994) (quoting *Hines*, 424 U.S. at 570) (emphasis in original).

The Petitioner conceded that a plaintiff must show that a union's actions tainted the arbitration procedure when he cited *Black* for this proposition in his brief to the Sixth Circuit; instead, he argued that he had in fact proved taint.[7] Dushaw raised for the

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7. The Petitioner mentions the example suggested in *Hines* and *Bowen* of a breach of duty by a union that would remove the finality bar to challenging

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first time in this Court the argument that proof of taint should not be required, making this contention only after the Court of Appeals found the matter to be dispositive. More significantly, his argument is entirely without merit.

Petitioner correctly states that the Sixth Circuit, and every other Court of Appeals that has considered the question, has read *Hines* as requiring a plaintiff in a hybrid 301 case to prove that the breach of the union's duty substantially affected the integrity of — that is, tainted — the grievance process. *See, e.g., Thomas v. United Parcel Serv., Inc.*, 890 F.2d 909, 915 (7th Cir. 1989); *Landry v. The Cooper/T. Smith Stevedoring Co.*, 880 F.2d 846, 852 (5th Cir. 1989); *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local No. 433*, 826 F.2d 755, 758 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988); *Wood v. Teamsters Local 406*, 807 F.2d 493, 500-02 (6th Cir. 1986), *cert. denied*, 483 U.S. 1044 (1987); *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1349, 1355 (9th Cir. 1981); *DeBoles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1018 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); *Hardee v. North Carolina Allstate Servs., Inc.*, 537 F.2d 1255, 1258 (4th Cir. 1976). There are two very good reasons why all these courts have ruled this way: their conclusion is based on the plain language of *Hines* and, furthermore, is the only logical result.

The Petitioner argues that the Circuit Courts have somehow

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an arbitration decision, where a union "manufactures evidence and knows from the start that it is false." *Bowen v. United States Postal Serv.*, 459 U.S. 212, 223 (1983) (citing *Hines*, 424 U.S. at 570). Petitioner then states that Scullion's statements at the company-level hearing are "quite similar" to this scenario. Petition at 17 n. 4. This statement might lead one to conclude that the evidence introduced at trial supported a theory that the Union somehow intentionally produced Scullion at the April 21, 1987, hearing and caused him to provide false information. However, there was no such evidence whatsoever.

expanded or placed a gloss upon *Hines*, adding a new element that this Court did not intend. This is nonsense. Quite clearly, whether the matter of "taint" is considered a "third element" in a hybrid 301 case, as Petitioner says, or is regarded as merely an aspect of a union's breach of duty, the principle that the union's actions must have substantially and adversely affected the outcome of the grievance procedure is an explicit requirement of *Hines*. The unanimity among the Circuits arises from the very clarity of this Court's statements in *Hines*, and there is no need to revisit the matter.

Furthermore, the requirement that the union's actions have affected the grievance process is consistent with both the policies underlying the federal labor law and with general, time-honored legal principles of causation and harmless error.

As noted, the law favors the finality of labor arbitrations, and a rule that arbitration decisions may not be set aside unless the integrity of the process was undermined serves this policy. Where the process has not "fundamentally malfunctioned" or been tainted because of the misconduct of the union, the employer should be protected from relitigation of a dispute that has been settled by final and binding arbitration under the collective bargaining agreement. *See Hines*, 424 U.S. at 567-69.

More generally, the law does not permit a remedy where there has been no harm from the alleged wrongful act. A motorist may cross the center line in a road, but he is not liable for his negligence if he strikes no one — the driver's lapse has done no damage. Similarly, an attorney may overlook a statute of limitations and file a lawsuit out of time, but he will not be liable for malpractice if his client's case was not meritorious and would have been dismissed on its merits — the attorney's error has caused the client no loss. In an example even more apropos, a trial judge may make an incorrect evidentiary ruling, but a new

trial will not be granted if the erroneously admitted or excluded evidence would not have affected the jury's verdict — the judge's mistake will be deemed "harmless error."

The matter of the effect of a union's breach of its duty of fair representation presents a situation directly analogous to these examples. Even where a union has failed to represent an employee fairly, if the deficiency did not affect the outcome of the grievance, it is no more than harmless error and is not grounds to set aside the arbitration procedure.

The ruling of the Court of Appeals in this case, affirming its earlier decisions that taint in the arbitration process is a necessary element of a hybrid 301 claim, is fully consistent with this Court's prior decisions, with the decisions of a majority of the circuit courts and with sound jurisprudence. There is no basis for this Court to overturn the Sixth Circuit's ruling.

C. The Level of Proof Required to Establish Taint

The Petitioner next argues that the Court of Appeals in this case went beyond the requirements of *Vaca* and *Hines* and ruled that a plaintiff must provide "additional, independent evidence . . . to prove taint" other than the evidence offered to prove the breach of duty. Petition at 19. Petitioner then goes on to discuss the difficulties of establishing that an arbitration proceeding was tainted, particularly in light of the quasijudicial immunity from suit and the immunity from testifying afforded to arbitrators. The Petitioner states that the Sixth Circuit required him to present testimony to prove taint, a requirement purportedly at odds with the decision of the Eighth Circuit in *Thomas v. Bakery, Confectionery & Tobacco Workers Union Local No. 433*, 826 F.2d 755 (8th Cir. 1987), *cert. denied*, 484 U.S. 1062 (1988).[8]

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8. Again, the Petitioner failed to raise this argument before the Court of Appeals, and did not even cite the *Thomas* case in his two lengthy appellate briefs.

Petitioner misstates the ruling of the Sixth Circuit and creates a false portrayal of a conflict in the Circuits. The Court of Appeals in this case discussed generally the requirement that any breach of the union's duty of fair representation must have tainted the arbitration proceedings, noting that a plaintiff must prove "that the outcome was more than likely affected by the Union's breach" and that the breach "seriously flawed" the arbitration process. (A.10). The Sixth Circuit cited to its decision in *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 585 (6th Cir. 1994), which in turn quoted this Court's decision in *Hines* regarding the requirement that the process have been seriously flawed.

Nowhere in its decision in this case did the Sixth Circuit hold that testimony from an arbitrator, or any other specific evidence, was required to establish the necessary taint, as Dushaw asserts. At most, the Court of Appeals ruled that, because the arbitration panel had before it all relevant evidence and arguments, there was "no indication that the Union failed to present evidence that 'probably would have brought about a different decision' in the grievance proceeding." (A.12 (quoting *Black*, 15 F.3d at 585)).

This conclusion is entirely consistent with this Court's rulings in *Vaca* and *Hines*. Furthermore, it is compatible with the Eight Circuit's decision in *Thomas*, in which the Court of Appeals concluded that, unlike this case, all the relevant information was *not* placed before the arbitrator. In *Thomas*, the critical issue was the liability of a purchaser company to honor the seniority rights of the employees of a purchased company. The parties presented testimony of the purchaser's general counsel that the transaction was merely an asset transfer that did not obligate it to honor the employees' seniority. However, the union did not seek to obtain a copy of the purchase agreement — which ultimately turned out to contain a clause in which the

purchaser assumed the seller company's labor contracts, including seniority provisions — and it was not provided to the arbitrator. The union's failure to present to the arbitrator what the court deemed to be "the most important evidence on this issue" was held to be a serious flaw in the process. *Thomas*, 826 F.2d at 763.

The Eighth Circuit in *Thomas* rejected the defendants' arguments that the arbitrator had all the essential facts before him; in the present case, on the other hand, the Sixth Circuit found just the opposite, that the ultimate decision-maker, the Joint State Committee, did have all the relevant facts and arguments before it. This case and *Thomas* are simply mirror images of each other, and the Petitioner cannot manufacture a split in the circuits requiring resolution by this Court from these two corollary cases.

In this case, the Court of Appeals concluded there was no evidence that a different course of action by the Union probably would have brought about a different decision by the Joint State Committee. The court did not require testimony by the arbitrators that they would have reached a different conclusion, but merely held that, objectively, no reasonable factfinder could find that a different outcome probably would have resulted. The Sixth Circuit did not require an insurmountable level of proof of taint in the arbitration process, and Petitioner's argument that this Court should grant certiorari on this basis is without merit.

D. The Sixth Circuit's Application of the "Clearly Erroneous" Standard

The Petitioner asserts that the Sixth Circuit improperly overturned the factual findings of the District Court, in derogation of this Court's ruling in *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), which applied the rule that an

appellate court may overturn a trial court's findings only if they are "clearly erroneous." The Petitioner cites *Anderson's* ruling that a court of appeals may not reverse a trial court simply because it would have decided the case or weighed the evidence differently. Petition at 24 (citing *Anderson*, 470 U.S. at 573-74). Specifically, the Petition notes that, under *Anderson*, a trial judge's factual finding that is not internally inconsistent and that is based on a decision to credit one witness over another, where each "has told a coherent and facially plausible story that is not contradicted by extrinsic evidence[,] . . . can virtually never be clear error." Petition at 25 (citing *Anderson*, 470 U.S. at 575).

Again, the Petitioner correctly states the law but mistakes its application to this case. The Sixth Circuit reversed the District Court's judgment in this case solely because there was no evidence that the assumed breach of the Union's duty of fair representation tainted the grievance process or affected the outcome of the arbitration. (A.11-12). There was essentially no factual dispute on this key question, as Dushaw himself admitted that all the facts and arguments he wished to have presented were in fact raised at the Cleveland hearing and, most significantly, at the Joint State Committee hearing where the final decision on his discharge was made.

The Petitioner asserts that the District Court's "findings were based upon numerous credibility determinations." Petition at 25. This may or may not be accurate as to the trial court's findings on the specific details of Dushaw's work performance, the Company's actions and the Union's investigation and presentation of his case.[9] However, the critical issue here —

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9. The Union submits that, in any event, the general rule of deference to a trial court's factual determinations is of dubious applicability in a case such as this, where the trial judge did not issue a decision for two full years after the trial and, unlike the Court of Appeals, did not have the benefit of a trial transcript to review the evidence and make her findings.

whether all the material facts and arguments were placed before the Joint State Committee as the ultimate decision-maker — simply was not determined based on credibility.

Dushaw argues that the Sixth Circuit erred in holding that the District Court's finding of taint was clearly erroneous when the appellate court "conceded in denying rehearing that it was a 'very close question on the question of taint.' " Petition at 26. This is a misstatement of the Court of Appeals' ruling. First, only the separate concurring opinion of Judge Wellford, *not* the decision of the full panel, mentioned any "close question."

More significantly, a reading of Judge Wellford's full opinion indicates that, in fact, he supported the panel's ultimate conclusion that the Union's conduct clearly did not have a substantial impact on the outcome of the arbitration. Judge Wellford said:

> [T]his case presents a very close question on the question of taint as a consequence of Scullion's mistaken or false testimony. The taint, if any, however, in my view, as expressed by our opinion in light of the entire record, *did not affect the ultimate outcome*.

(A.15 (emphasis added)).

The only fair reading of this opinion is that Judge Wellford believed it was a close question as to whether Scullion's statements tainted the Union's representation of Dushaw in the grievance process, although Judge Wellford perhaps used the word "taint" imprecisely. Unquestionably, however, he agreed with the full panel that Scullion's statements did not "taint" the arbitration process within the meaning of *Vaca* and *Hines*, as they did not "seriously undermine[ ] the integrity of the arbitral process." *Hines*, 424 U.S. at 567.

The Court of Appeals did not find that the issue of taint was a close question but, rather, properly held that the District Court's factual finding on this dispositive issue was clearly erroneous. Accordingly, the Petitioner's argument on this point does not provide a basis for this Court to grant certiorari.

CONCLUSION

For the foregoing reasons, Respondent Truck Drivers Union Local 407 respectfully prays that this Court deny the Petitioner's application for a writ of certiorari.

Respectfully submitted,

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